No. 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Petitioner

v.

LUBLIN, McGAUGHY & ASSOCIATES, ET AL,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REASONS FOR DENYING A WRIT OF CERTIORARI

This is a case in which the Department of Labor and its counsel have tacitly admitted that they are attempting to extend the reaches of the Fair Labor Standards Act into what is virgin territory. If certiorari is granted and the decisions of the District Court and the Court of Appeals are reversed, it is highly probable that no local business establishment will be excluded from the provisions of the Act; it is certain that no profession, no matter how local in nature, will be *dehors* the provisions of the Act.

(1) The first and foremost reason advanced by the Petitioner for obtaining this writ is an alleged conflict between the decision here of the Fourth Circuit and the decision of the Eighth Circuit in *Mitchell v. Brown Engineering Co.*, 224 F. (2d) 359. Petitioner steadfastly refuses to recognize the obvious distinction between these cases as disclosed by a cursory reading of the opinion and as pointed out by the District Court below as follows (R. 7a and 8a)*: "The Eighth Circuit pointedly suggested that the activities of a 'resident engineer' on a job involving repairs to an interstate highway was one factor aiding the Court in its conclusion. In the instant case any employee performing similar duties would be exempt as a 'professional' employee and hence not within the Act. In fact, the gist of the determination by the Eighth Circuit lies in this brief comment:

> "In this case the activity of defendant's employees was in connection with the repair, alteration, and improvement of existing instrumentalities of interstate commerce. Their duties, beyond the preparation of plans and specifications for a proposed construction project, required their presence at the job site as 'resident engineer'."

The Eighth Circuit opinion continues at great length to analyze in minutest detail the duties and activities of the *resident* engineer and his direct control of the work being performed under his constant jobsite supervision. Before quoting the contract itself, the

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* Page numbers followed by lower case letters refer to that part of the record printed in Petitioner's appendix for use of the Court of Appeals; capital letters followed by page numbers refer to that part of the record in Respondents' Appendix bound with their brief printed for use of the Court of Appeals. The letter "P" followed by page numbers refers to the petition for a writ of certiorari.

Court, on page 364, said: "The inference is fairly deducible that the work of the 'resident engineer' was a vital factor in affecting the progress of the construction project."

In the instant case there is an utter absence of evidence that Lublin, McGaughy & Associates performed any services on an existitng instrumentality of commerce or engaged in any construction work by detailing a sub-professional employee to act as a resident supervisor. To the contrary, the record conclusively demonstrates that the respondents do *not* operate in this manner; they furnish no supervision whatever on any government work. (R. A-23, A-24, A-25). On other work, if these Respondents furnish supervision, it usually consists of one weekly visit to the jobsite, for one hour or so, by a qualified registered engineer or architect who is, more often than not, a partner or associate, and obviously exempt from the Act. And so, even though the opinion of the Fourth Circuit commented upon an apparent oversight of the Eighth Circuit in the *Brown* case, it certainly did not "recognize the conflict" as Petitioner alleges (P. 13).

(2) Secondly, Petitioner contends that the opinion of the Court of Appeals in the instant case is at variance with other opinions of still other circuits. Petitioner has cited many cases in each of the courts below dealing with employee-draftsmen and technicians of large national *construction* firms where such employees were held to be under the Act. He completely ignores what the Court of Appeals here said in its opinion; namely, "(t)here is, however, no clean-cut holding that the work of employees of independent architects, such as are before us in this case is 'commerce' under the Act." (P. App. A 41).

(3) In the third numbered reason advanced by Petitioner for the issuance of a writ, we find two unconnected discourses:

Discourse (a) deals with the alleged error of the courts below in finding the nature of the work of the Respondents purely local in character. It is respectfully submitted that an architectural and engineering firm could hardly be more local in character than the one involved here, unless the mere existence of a Washington branch office changes its category. Both offices attend to purely local business and although they write letters out of the state and have clients who transmit plans out of the state, it can be truly said that so does every other engineer and architect in America who practices his profession with even moderate success.

The admitted exclusion of employees of local architects, acknowledged in the Labor Department's own Interpretative Bulletin and based on a House Committee report, can only stem from the obvious remoteness from commerce of the individual employee's work. Except for survey parties gathering preliminary data for plans, Respondents' other employees virtually never even see the jobsite, if indeed the structure being planned is ever erected. The job-list (R. 18a-29a) and other parts of the record make it obvious that many, many projects never get beyond the drafting boards. Some are abandoned for financial reasons; others are only intended as preliminary studies or "advance planning" for possible future development. This is a far cry from the work of construction engineering employees, stationed at or near a jobsite and participating daily in the actual progress of construction.

Discourse (b) deals with the allegation that plans and specifications are "goods" within the meaning of

the Act. This matter has been completely and definitely disposed of by the Court of Appeals below which devoted the first half of its opinion to this point. (P. App. A 34-38 incl.) Petitioner cannot and did not produce a single case in any court from any jurisdiction in which it has been held that plans or specifications are "goods". Both courts in which this case has been heard have readily distinguished this case from *Western Union v. Lenroot,* 323 U. S. 490, and *Powell v. U. S. Cartridge Co.,* 339 U. S. 497, but Petitioner doggedly refuses to recognize the obvious distinctions.

Relying largely on the *Lenroot* and *Powell* cases, Petitioner has unsuccessfully argued that plans and specifications are goods in the following tribunals:

McComb v. Turpin, 81 F. Supp. 86 (D. C., Md.)
Collins v. Ford, Bacon & Davis, 71 F. Supp. 229 (D. C., Pa.)
Mitchell v. Brown Eng. Co., 27 Labor Cases #68, 814 (D. C., Iowa, 1954)
Mitchell v. Brown Eng. Co., 224 F. (2d) 359, (C.A.-8)*
Mitchell v. Lublin, et al, 13 W.H. Cases 211, (D. C., Va.)
Mitchell v. Lublin, et al, 250 F. (2d) 253 (C.A.-4)

Of the ten jurists to whom the issue has been thus expressly presented over the past ten years, not one has been willing to decide that plans and specifications are goods! The reason is plain enough: By no stretch of the judicial imagination can these two cases cited by Petitioner be said to stand for that untenable proposition.

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* Finding coverage under the "in commerce" section, on the basis of the activities of the "resident engineer", the Eighth Circuit expressly declined to opine whether plans and specifications are goods (p. 365).

(4) The reason next assigned for granting the writ attempts to explain that Petitioner's own Interpretative Bulletin, in which it is stated that employees of a local architectural firm are not to be included for coverage, should not apply to the Respondents, because of their "multi-state practice", and their "extensive engineering operations". (P. 23).

The Court is reminded that throughout these proceedings the Department of Labor has relied entirely upon mere nomenclature to characterize the operations of Respondents as interstate in character. The record does not give substance to the contention. The nature of this professional firm's work is just about as local as the work of any such firm with four partners could be. Moreover, as this Court has repeatedly stated, it is the work of the individual employee that counts. There is nothing in this record to suggest that Respondents' subprofessional employees are any differently occupied than similar employees of other local architects and engineers.

(5) The final reason advanced by Petitioner for the granting of the writ seems to be based upon some statistics of a magazine entitled *Consulting Engineer*. Petitioner states the said publication discloses that there are "thousands of non-professional employees in this field". (P. 25). The magazine further declares, according to the Petitioner, "that most of the firms in this field do not limit their operations to any one state". (P. 26).

It is respectfully suggested that the facts and figures from the said magazine have nothing whatsoever to do with the principles involved here, unless the Petitioner is contending by innuendo that Congress

erred in exempting the engineering profession from coverage by the Act.

In addition, it is difficult to see how the material from an ordinary journal can be employed in a petition for a writ as is here requested. It was never included in any of the evidence or argument at either of the former trials and appears here for the first time, without any basis or foundation beng established for its authenticity or legitimacy. In any event, it would seem quite irrelevant.

CONCLUSION

There is no conflict of circuits here to be resolved; no principles that threaten the foundation of the Fair Labor Standards Act; no lower court decision that does violence to any prior rulings of this Court. The simple admitted fact is that the Department of Labor is trying to expand the legal meaning of the word "goods" and, in addition, is trying to invade the periphery of the professions which are exempt by statute from the provisions of the Act.

We assert with confidence that Congress did not intend to cover the sub-professional employees of professional architects and engineers. As expressed by Judge Chestnut in *McComb v. Turpin,* 81 F. Supp. 86, this was not "the mischief to be remedied by the Act . . . . . ". In this respect, it is highly significant that none of the three cases involving independent architects and engineers (*McComb v. Turpin,* supra; *Mitchell v. Brown Eng. Co.,* supra; and the case at bar) was instituted by the defendants' employees; each was instituted by the Department of Labor.

We believe that what Petitioner is attempting should be done by the Congress, if it is to be done at all, and not by an administrative agency or a judicial body. We respectfully urge that the petition for a writ of certiorari be denied.

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March, 1958